In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 807.

GIANT TIGER DRUGS, INC.,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL.

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A. MOTION.

Appellee, pursuant to Rule 16(b) of the Revised Rules of this Court, moves that this appeal be dismissed on the ground that said appeal does not present a substantial federal question of sufficient importance and substance to warrant further consideration and argument of this case.

B. STATEMENT OF THE CASE.

This action is an appeal from the Supreme Court of Ohio, having originated in the Municipal Court of Euclid, Ohio.

On September 14, 1959, a warrant was sworn to and subsequently an arrest made of Giant Tiger Drugs, Inc., the appellant, charging that on the 6th day of September, 1959, being the first day of the week, commonly called Sunday, it did unlawfully suffer or permit a building located at 22480 Shore Center Drive, Euclid, Ohio, to be opened for the transaction of business in violation of Section 3773.24 of the Revised Code of Ohio.

The appellant was tried, found guilty and fined $25.00 and costs by the Municipal Court of Euclid, Ohio. The conviction was affirmed by the Court of Appeals for the County of Cuyahoga, State of Ohio, in an unreported decision without opinion. The Supreme Court of Ohio dismissed an appeal from the decision of the Court of Appeals of Cuyahoga County, Ohio, for the reason that no debatable constitutional question was involved. The decision is reported in Ohio State Reports, Volume 171, at page 294.

C. STATUTE INVOLVED.

Appellant sets forth, commencing at page 2 of the Jurisdictional Statement, Ohio Revised Code Section 3773.24 which is invloved in this action.

Ohio Revised Code Section 3773.24 is not ambiguous, unreasonable, arbitrary and discriminatory in classifications.

A classification of business which is reasonable for the purpose of legislation is not unconstitutional. (See 50 *Am. Jur.* 810, Sundays and Holidays.)

> Section 11 *Classification of Businesses*--The equal protection clause of the Federal Constitution, while prohibiting class legislation, does not prohibit reasonable classification of persons and things for the purpose of legislation and, hence, a state may, so far as the Federal Constitution is concerned, classify business and objects for purpose of legislation, provided the classification is not arbitrary but is reasonable for the purpose of the legislation and based upon proper and justifiable distinctions concerning the purpose of the law. Accordingly, in enacting statutes or ordinances requiring observances of Sundays, the legislative body is vested with discretion to determining the kinds of pursuits, occupation or business to be included or excluded, and its determination will not

be interfered with by the courts, provided the classifications and discriminations made are founded upon reasonable distinctions and have some reasonable relation to the public peace, welfare and safety. The fact that there are occupations other than those affected which the Legislature might, with equal propriety, have included, is not a valid objection to the law."

Appellant claims that by the various exceptions the Ohio Legislature has passed a law which constitutes class legislation, is discriminatory and is incapable of clear construction.

Only a cursory examination of the statute is required to find that it has always prohibited all "common labor" and "transaction of business" with the exception of work of necessity or charity, although the statute specified it did not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, toll gates or ferries from attending them on Sunday.

We find no unreasonableness in extending the exclusion of a few modes of traveling to encompass all traveling. This latter can be supported on two grounds. First, traveling is one of our national pastimes. Likewise, it would be vain to attempt to allow persons freedom for recreation, sports, and amusements, without assuring them they would be free to travel to and from such activities. Second, our national economy necessarily rests upon transportation, whether by rail, motor vehicle or airplane, so that while it may not be necessary to buy milk and other fresh foods on Sunday, it is necessary that they be moved to market over the weekends so as to have them available during the week. Clearly, the exemption for traveling, under paragraph (A), is a reasonable classification.

Under paragraph (B), the Sunday enjoyment of other activities, more generally accepted as being recreation, sport or amusement, is exempt and is clearly a reasonable classification.

The exemption of "fairs" under paragraph (C) of the statute and under (D) of publicly owned places of entertainment, recreation or education could really have been, by ordinary rules of statutory construction, encompassed under paragraph (B) as amusements, etc. That the Legislature saw fit to specify exceptions (C) and (D) does not constitute class legislation.

Even if we take a narrow view that the State has specifically exempted only "fairs" and the "operation of publicly owned places of entertainment, recreation or education" (without considering whether or not these activities would already be exempted under paragraph (B) as general recreation, etc.), it is clear that a state can reasonably create classifications of fairs or the operation of a publicly owned place of entertainment. We are familiar enough with what constitutes a "fair" to agree that a fair may be permitted on Sunday without doing violence to the purpose of Sunday closing legislation. Similarly, the operation of recreational activity carried on in publicly owned places of entertainment—which necessarily assumes at least the right of supervision by the public body which owns the sites—does no violence to the purpose of Sunday closing laws. (See 50 *Am. Jur.* 811, *infra* p. 6.)

Certainly there is a relation between health, safety and morals and the exceptions allowed for traveling, recreation, fairs and publicly owned places of entertainment, recreation or education.

In our present mode of living "rest from ordinary activities" does not necessarily mean, as it did long ago, that we cease all activity on Sunday except church-going. Today's American is ofttimes more energetic physically in

his recreation than in his daily labors. The Legislature has wisely decreed that exceptions be allowed for these salutary activities. It would seem that appellant's complaint is not really grounded so much on the fact that the statute has been liberalized, but rather in that it was not liberalized so as to exempt appellant. By no stretch of the imagination, however, is the amendment of such a material nature as to render invalid a statute previously adjudicated to be constitutional.

In any event, the classification under Ohio Revised Code Section 3773.24 is more than adequate to meet the constitutional requirement.

> "Due process of law permits the sovereign to legislate to affect a single individual by name, a class by description, or to embrace the entire populations, the only requirement being that there be some reasonable basis, and that the law shall operate equally. Nor is there any constitutional requirement that the object of legislation shall relate to all the people." (10 *O. Jur.* 2d, 434.)

The Supreme Court of the United States rejected the same questions that are involved in the instant case when, on December 8, 1958, it made an entry in the case of *Kidd, et al. v. State of Ohio*, 358 U. S. 131, dismissing same for want of a substantial federal question. The *Kidd* case had been appealed to this Court from the Ohio Supreme Court and involved the same questions. The Ohio Supreme Court held that the Sunday closing law was not vulnerable to the attack that it is a measure for the enforcement or promulgation of religious observances, and further held that so long as those classifications are not arbitrary, capricious or unreasonable, and do not discriminate among the same classes of pursuit, they are valid. *State of Ohio v. Kidd, et al.*, 153 N. E. (2d) 413, 167 O. S. 521.

We have previously in this brief referred to the rule that the equal protection clause does not prohibit reason-

able classification of persons and things for the purpose of legislation by quotation from 50 *Am. Jur.* 810, Sundays and Holidays, Section 11, Classification of Business (*supra*, pp. 2-3). To exemplify the pitfalls inherent in a statute which attempts to enumerate either the businesses which are subject to Sunday closing laws or those which are exempted therefrom, we invite the Court's attention to the text immediately following that which we previously quoted.

> "But the courts will not sustain a statute or ordinance which prohibits the exercise of certain businesses or occupations, legitimate and lawful within themselves, which do not carry inherent reasons for such discrimination, where there is no prohibition placed upon other similar occupations. And while in the majority of the older cases statutes which prohibited the following of certain occupations only, or, after general prohibitory provisions, excepted certain occupations and callings from the operation of the statute, have been sustained, the tendency of the more recent cases is to hold such statute invalid as being discriminatory or constituting class legislation." 50 *Am. Jur.* 811.

The text illustrates this aspect of the rule by an analysis of laws aimed specifically at barbering:

> "According to many decisions, legislation which singles out the business of barbering and forbids its exercise on Sunday is invalid upon the ground of unjust discrimination and class legislation, although in a majority of the cases, laws prohibiting barbering have been sustained against the contention that they are class legislation or operate to deprive one of his property without due process of law." *ibid.*

The text also points out that the legislature may validly discriminate between different forms of amusement or entertainment:

"The legislature may recognize different degrees of evil tendency in different forms of amusement or entertainment and may give effect thereto in Sunday laws without being open to the charge that the legislation is arbitrary and unwarranted, but the statutes must apply to the entire class which they purport to affect. The validity of a statute prohibiting the operation of dance halls on Sunday, excepting from the operation thereof dance halls or pavilions maintained or conducted in public playgrounds or in parks where no admission was charged, and where good order was maintained and no intoxicating liquor sold, has been sustained." *ibid.*

Ohio Revised Code Section 3773.24 meets the test of generality both as to inclusion and exclusion, and likewise meets the test of reasonableness. The newly added exemptions are just as susceptible of interpretation by the courts as the retained exemptions of "works of charity or necessity." The "general language" of the statute does not make it "vague." If the legislature had attempted to make it specific as appellant infers it should have, by prohibiting or excepting certain occupations only, it would in all probability be invalid. No legislature, however wise, could prepare such an enumeration without overlooking some activity which would result in discrimination.

Ohio Revised Code Section 3773.24 does not violate the clauses of the first amendment prohibiting an establishment of religion and guaranteeing its free exercise, and does not violate the equal protection clause of the fourteenth amendment.

Appellant argues that Ohio Revised Code Section 3773.24 is unconstitutional because it is a law for the promulgation of religious beliefs. True, that section by its term is not applicable to "persons who conscientiously

observe the seventh day of the week as the Sabbath and *abstain thereon from doing things prohibited on Sunday.*" However, the evidence in this case under consideration does not disclose that the appellant's place of business involved closed on any day of the week in the observance of a religious belief, or for any other reason, and, therefore, the appellant is hardly in a position to attack the statute on the constitutional grounds asserted. *Humphrey Chevrolet, Inc. v. City of Evanston*, 7 Ill. (2d) 402, 131 N. E. (2d) 70; *State v. Grabinski*, 33 Wash. (2d) 603, 206 P. (2d) 1022.

Sunday closing laws have generally been upheld as constitutional and valid against a variety of attacks, such as, they constitute class legislation, they are too uncertain, they violate the constitutional rights of citizens as to equal privileges and immunities, they violate the right of life, liberty or the pursuit of happiness, and they violate the constitutional right of freedom of religion. 50 *Am. Jur.* 803, Section 5; 83 *Corpus Juris Secundum* 800, Sunday, Section 3.

The question whether designating Sunday as the "day of rest" is a violation of the freedom of religion guaranteed by the Constitution was discussed in the case of *State v. Ullmer*, 143 N. E. (2d) 849, 105 O. App. 546; affirmed 150 N. E. (2d) 413, 167 O. S. 541, appeal dismissed 358 U. S. 131. Paraphrasing the court's decision, it was held:

> "In choosing Sunday, one cannot argue it is in furtherance of religion. The statute requires nothing, imposes nothing, dictates nothing. It leaves man completely free to choose his religion and to practice it without let or hindrance. * * * In passing legislation, it is proper to consider ease or difficulty of enforcement. It is easier to enforce a day which a large group

of people already observe than let individuals pick their own days. The selection of this day, Sunday, doesn't interfere with any one religion."

Appellant has discussed the recent ruling made by the Federal District Court in Massachusetts in the case of *Crown Kosher Supermarket of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), to which the United States Supreme Court granted a right to appeal said decision.

It should be noted that the "Lord's Day" statute of the Commonwealth of Massachusetts does not contain the same type of exceptions which were written into the Ohio statute. Under the language of the Massachusetts statute, the sale of "Kosher Meat" was only permitted from 6 o'clock A. M. to 10 o'clock A. M. on Sundays. It was this particular restriction which the Federal District Court found to be an unreasonable one imposed upon those who observed a day other than Sunday as a day of rest.

There is no such limitation in Ohio statute on the right to transact business for those who * * * "conscientiously observe the seventh day of the week (Saturday) as the Sabbath and abstain thereon from doing things prohibited on Sunday."

D. CONCLUSION.

Wherefore, in view of the foregoing, appellee respectfully contends that this appeal should be dismissed, as no substantial constitutional questions are presented.

Respectfully submitted,

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